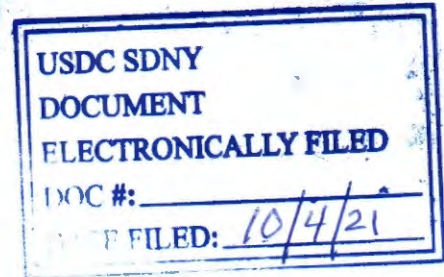


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



SAMUEL ACEVEDO, et al.,

Petitioners,

-against-

20-cv-07361 (CM)(SN)

MICHAEL CAPRA,

Respondent.

ORDER GRANTING LIMITED CERTIFICATE OF APPEALABILITY

McMahon, J.:

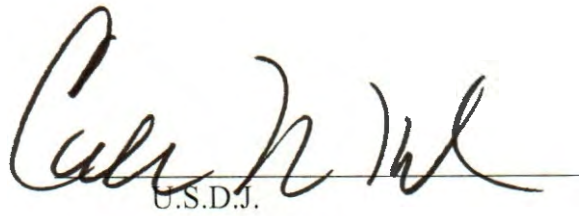
This court has once again been asked to grant a certificate of appealability in a case in which the complaint has been dismissed – a decision from which I believed an appeal could be taken as of right. But I suppose I could be wrong about that, especially as dismissal was without prejudice.

Therefore, and to the extent necessary, I GRANT the requested certificate of appealability, but limited to the issue of whether this case is properly brought pursuant as a habeas corpus action pursuant to 28 U.S.C. § 2254, or whether it must be brought as an action for damages pursuant to 42 U.S.C. § 1983. As should be apparent from my opinion dismissing the complaint, district courts are much in need of appellate guidance on that question.

I do NOT, however, grant a certificate of appealability from my determination that, if this action can be maintained in habeas, the plaintiff failed to exhaust administrative remedies by following the wrong procedures in the New York State courts. I do not believe there are reasonable grounds for concluding that the plaintiff took the necessary steps to exhaust in the state courts. However, should the Court of Appeals wish to examine that issue, I urge that it be certified to the New York Court of Appeals, so that the necessary expertise on what are admittedly tricky issues of state procedure can be brought to bear on the question.

Finally, I do NOT grant a certificate of appealability on the issue of whether it violates due process to enforce § 2254's exhaustion requirements in this instance. Again, I do not believe there are reasonable grounds for concluding that there has been any due process violation here.

Dated: October 4, 2021



U.S.D.J.

BY ECF TO ALL COUNSEL